



UNITED STATES SENATE
**REPUBLICAN
POLICY COMMITTEE**

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Terrorism Cases Headed to Appeals Courts

What Appellate Judges Do – And Why More Are Needed Now

Who decides cases in the Federal courts? For the 12 months ending September 30, 2001, there were more than 302,000 cases filed in the Federal district courts, and more than 295,000 of them were disposed of. More than 57,000 appeals were filed with the circuit courts, and about the same number were disposed of. The Supreme Court was asked to review nearly 9,000 cases from Federal and State courts both, and it accepted 99.

No one would look at these numbers and conclude that district court judges have more influence than Supreme Court justices, but everyone who looks at these numbers must see that more than 99.9 percent of all cases filed in Federal courts are never decided by the Supreme Court. Even important cases often come to their end at a court of appeals – where today about one of every five seats is vacant.

President Bush has nominated many fine men and women to the United States courts of appeals, but the Senate is moving s-l-o-w-l-y to confirm them. Most of the distinguished lawyers who were nominated to the courts of appeals nearly a year ago have yet to have a hearing.

The circuit courts get all kinds of cases, but as the weeks roll by they will be getting more and more cases dealing with terrorism. For example, summarized below are three terrorism cases that have recently arrived at two courts of appeals. A fourth case, *Detroit Free Press v. Ashcroft*, 2002 U.S. Dist. LEXIS 5838 & 5839 (D. E. Mich., April 3, 2002), was discussed in the RPC Paper of April 25, 2002, “New Appellate Judges Needed Now.”

We doubt that any American thinks the courts of appeals will do a better job on the terrorism cases, or on any other cases, if they are only partially filled. It’s time to give the appellate courts the manpower they need to do their essential work, and to do it thoroughly, efficiently, and wisely.

The 7th Circuit has been called on to review *Boim v. Quranic Literacy Institute*, a case in which the parents of a young man who was murdered in Israel by Hamas terrorists brought a private action for damages against groups based in the U.S., alleging that the groups committed, or aided and

abetted, acts of international terrorism because they provided material support to Hamas. See, 18 U.S.C. §2333. Defendants moved to dismiss, and the district court denied the motion. The district court held that the alleged actions of the groups in making contributions of money to Hamas, a designated “foreign terrorist group,” did *not* constitute “international terrorism” (or aiding and abetting) if there was no additional allegation that the contributors had participated in terrorism. However, additional allegations such as knowing and willful participation in terrorism, or recruiting, organizing, or training terrorist operatives *did* constitute involvement in “international terrorism.” The court held, therefore, that a civil cause of action existed for aiding and abetting acts of international terrorism, and that the *Boim* parents had sufficiently alleged their lawsuit against the groups.¹

In the *Humanitarian Law Project* case, the 9th Circuit will review a successful vagueness challenge to the designation of “foreign terrorist organizations” under the Antiterrorism and Effective Death Penalty Act (AEDPA). Briefs are due this summer.

Parties who desired to provide financial and other assistance to organizations which had been classified as “terrorist organizations” by the Secretary of State brought suit challenging the constitutionality of AEDPA. The court granted plaintiffs’ motion for a preliminary injunction to prevent the Attorney General from enforcing the Act against them. The court said that plaintiffs were unlikely to prevail on their claims based on First Amendment freedom of association, but they were likely to succeed on the merits on their claim that some provisions of the Act were void for vagueness.²

The 9th Circuit also will review a denial of a petition for habeas corpus for combatants who were captured in Afghanistan and are now being held by the United States at Guantanamo Naval Base in Cuba. Briefs in this case are due this spring. The district court held that the U.S. individuals who petitioned for the writ lacked standing and that the court itself lacked jurisdiction. The petition was dismissed with prejudice.³

The cases are, of course, much more complex than the summaries, which is why the Senate ought to confirm appellate judges who can begin now to wrestle with these issues.

Written by Lincoln Oliphant, 224-2946

¹ *Boim v. Quranic Literacy Institute*, 127 F.Supp.2d 1002 (D. N. Ill., Jan. 10, 2001), on interlocutory appeal to the United States Court of Appeals for the 7th Circuit, appellate court docket nos. 01-8001 and 01-8002, 01-1969 and 01-1970. Briefs in this case were filed in the fall of 2001.

² *Humanitarian Law Project v. Ashcroft*, 9 F. Supp. 1176 (D.C. Calif., June 8, 1998) and 9 F. Supp. 1205 (D.C. Calif., June 15, 1998), *affirmed*, 205 F.3d 1130 (9th Circ. Mar. 3, 2000), *cert. denied*, 532 U.S. 904 (Mar. 5, 2001); *on remand to the district court*, 2001 U.S. Dist. LEXIS 16729 (D.C. Calif., Oct. 2, 2001), on appeal to the United States Court of Appeals for the 9th Circuit, appellate court docket nos. 02-55082 and 02-55083.

³ *Coalition of Clergy v. Bush*, 2002 U.S. Dist. LEXIS 2748 (D.C. Calif., Feb. 21, 2002), on appeal to the United States Court of Appeals for the 9th Circuit, appellate court docket no. 02-55367.